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# China's Arsenal of Political Persecution - A Double-Edged Sword

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**CHINA'S ARSENAL OF POLITICAL  
PERSECUTION - A DOUBLE-EDGED  
SWORD**

**By Ralph Hua\***

I. INTRODUCTION

On December 25, 2009 the Beijing Municipal No. 1 Intermediate People's Court, after a closed trial<sup>1</sup>, issued a guilty verdict and eleven-year sentence to Mr. Liu Xiaobo<sup>2</sup>, a Chinese scholar, for the crime of "inciting subversion of state power."<sup>3</sup>

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<sup>1</sup> See Andrew Jacobs, *Trial in China Signals Attack on Dissidents*, N.Y. TIMES, Dec. 24, 2009, at A1, available at <http://www.nytimes.com/2009/12/24/world/asia/24china.html>.

<sup>2</sup> Mr. Liu Xiaobo was recently awarded the 2010 Nobel Peace Prize on October 8, 2010. See The Nobel Peace Prize, [http://nobel-prize.org/nobel\\_prizes/peace/laureates/2010/announcement.html](http://nobel-prize.org/nobel_prizes/peace/laureates/2010/announcement.html) (last visited Nov. 29, 2010).

<sup>3</sup> Case Update: International Community Speaks Out on Liu Xiaobo Verdict, Human Rights In China (Dec. 30, 2009), <http://www.hrichina.org/public/contents/press?revision%5fid=173860&item%5fid=172713> [hereinafter The

The conviction arose from a manifesto called “Charter 08,” which promotes a series of political reforms in China.<sup>4</sup> Mr. Liu, who previously wrote numerous articles criticizing the political system and other social issues in China, was one of the main drafters of this manifesto. Despite the fact that none of his articles or the underlying manifesto incites real violence against either the regime or any individual, the court, without any discussion of the legal merits other than citing the titles and brief quotes from Mr. Liu’s articles, found that his articles were “slander” and “incite others to overthrow [the] country’s state power and the socialist system.”<sup>5</sup> Without engaging in any form of balancing test or analysis regarding the constitutional guarantees of freedom of speech, the court simply concluded, “Liu Xiaobo’s actions have *obviously* exceeded the freedom of speech category and constitute criminal offense.”<sup>6</sup>

The guilty verdict from the closed trial and the omission of sufficient legal analysis by the court should not come as a surprise. Mr. Liu, a famous veteran of the 1989 Tiananmen Square protest, stood almost no chance of acquittal as soon as the prosecutors pressed this latest charge against him<sup>7</sup> more than a year before his trial. In this case, the Chinese court did exactly what the Chinese Communist Party (CCP) has always expected it to do: quash dissenting voices swiftly with or without legal analysis. The Chinese court also, as expected, faithfully played the role of guardian of the “socialist system,” a highly abstract term that is a top priority under the Chinese Constitution.<sup>8</sup>

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Verdict].

<sup>4</sup> Charter 08, Open Letter from Yu Haocheng et. al., Human Rights in China (Dec. 9, 2008) *translation available at* <http://www.hri-china.org/public/contents/press?revision%5fid=173861&item%5fid=85717>.

<sup>5</sup> The Verdict, *supra* note 3.

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> Liu was previously sentenced to two years in prison and three years of “reeducation through labor” for his writings. See Pen American Center, China: Liu Xiaobo, <http://www.pen.org/viewmedia.php/prmMID/3029/prmID/172> (last visited Nov. 29, 2010).

<sup>8</sup> XIAN FA [CONSTITUTION] art. 1 (1982) (China), *available at* [http://english.gov.cn/2005-08/05/content\\_20813.htm](http://english.gov.cn/2005-08/05/content_20813.htm) (“The socialist system is the basic system of the People’s Republic of China. Disruption of the socialist system by any organization or individual is prohibited.”).

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Mr. Liu's actual fate might be the same as thousands of dissidents before him. His case, however, differs from the majority of the old generation of political charges in at least two aspects. First, the statute under which he was convicted is found under the chapter "Crimes Endangering National Security," a newly enacted chapter with facially politically-neutral crimes rather than the old "Counterrevolution Crimes".<sup>9</sup> Second, his case is an example of the CCP's increasing wariness of public involvement in politically sensitive charges, which is a departure from the practice of openly accusing counterrevolution offenders of decades ago, especially shortly after 1989.

This article explores the Chinese government's arsenal for persecution of political dissenters. It also explores the subsequent detrimental effect it has had on the stability of Chinese society as well as the causal link between the hard line approach to dissent and the increasing social unrest.

### II. AN OVERVIEW OF POLITICAL OFFENSES IN CONTEMPORARY CHINA

Unlike its European counterparts that have had long periods of liberalism toward political offenders<sup>10</sup>, China has shown almost no moment of such leniency toward offenders directly or indirectly challenging the ruling authority during its two thousand-year history. The dozen major dynasties in China's history each lasted for an average of two centuries during which time uniformity and power concentration was always a commonly shared and essential feature of the dynasties.<sup>11</sup> Un-

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<sup>9</sup> See Human Rights in China & Human Rights Watch/Asia, China: Whose Security? "State Security" in China's New Criminal Code 2 (1997), available at <http://hrichina.org/public/PDFs/Reports/HRIC-Security.pdf>.

<sup>10</sup> NICHOLAS N. KITTRIE, *REBELS WITH A CAUSE: THE MINDS AND MORALITY OF POLITICAL OFFENDERS* 168 (Westview Press 2000). "Papadatos suggested that the new liberal attitudes toward political offenders were a product of the revolutions in the first half of the nineteenth century. Since '[t]he parties in power had found themselves alternately conquerors and vanquished,' Papadatos wrote, 'political offenders seemed unlucky players rather than criminals.'" *Id.*

<sup>11</sup> See ARTHUR COTTERELL & DAVID MORGAN, *CHINA'S CIVILIZATION: A*

like Europe, which had long been in a decentralized state after the fall of the Roman Empire and no ruler from any individual country had the administrative capacity to rule a substantial part, if not the whole, of Europe for an extensive period of time, each of China's major dynasties throughout history controlled vast flatlands through which the emperor's army could march unhindered.<sup>12</sup> During feudalism, European rulers did not possess absolute power because most of the landowning classes were independent.

The king of France, for example, was considered only a duke in Brittany and had limited authority in that region for hundreds of years. In practice if monarchs wanted to do anything - start a war, build a fort - they had to borrow and bargain for money and troops from local chieftains, who became earls, viscounts, and dukes in the process.<sup>13</sup>

China ended this kind of decentralized feudalism as early as around 221 B.C., when the Qin Dynasty unified China after the Warring States Period.<sup>14</sup> A Chinese emperor became not only the ruler of every single person in his dominion, but also the owner of every inch of the land, and thus, an authority that bargained with no one.<sup>15</sup> For long periods of time, the rulers of

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SURVEY OF ITS HISTORY, ARTS, AND TECHNOLOGY, at 309 (Praeger Publishers 1975) (Outlining chronology of Chinese history with main dynasties); CHARLES O. HUCKER, CHINA'S IMPERIAL PAST: AN INTRODUCTION TO CHINESE HISTORY AND CULTURE 55 (Stanford Univ. Press 1975). "The Chinese world should be united under a single Son of Heaven, and his control should be effectively centralized." *Id.*

<sup>12</sup> FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD 36-37 (1<sup>st</sup> ed. 2003).

<sup>13</sup> *Id.* at 37.

<sup>14</sup> COTTERELL & MORGAN, *supra* note 11, at 47. "By 221 B.C....[i]n place of the old feudal system of government belonging to the Classical Age a centralized monarchy was established." *Id.*

<sup>15</sup> CHARLES O. HUCKER, CHINA'S IMPERIAL PAST: AN INTRODUCTION TO CHINESE HISTORY AND CULTURE 56-57 (Stanford Univ. Press 1975). "The ruler was administrator, military leader, judge, manager of the economy, priest, educator, and moral exemplar. His responsibility was total. Accordingly, his authority had to be unlimited; and the Chinese polity came to be organized in such a way that the ruler's authority was totalitarian in practice." *Id.*; MICHAEL LOEWE, IMPERIAL CHINA 199 (Praeger Publishers 1965). "It was held, all arable land had been the property of the monarch. The principle implies that land cannot be acquired by purchase, as ownership and the right of disposal is vested solely in the sovereign." *Id.*

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European countries not only had to bargain with their own dukes but also had to tie, whether tightly or loosely, their legitimacy with the church. A Chinese emperor, on the contrary, was a self-proclaimed "Son of Heaven," whose legitimacy was as self-evident as the heaven itself.<sup>16</sup> One example demonstrates this striking difference: King Henry VIII, in order to divorce Catherine of Aragon and marry Anne Boleyn, had to annul his marriage and later break away from the Catholic Church, at the cost of creating internal strife and external invasion. The Chinese emperors, however, never needed to seek confirmation from a religious institution nor foreign sovereign.

This historical background is certainly helpful in understanding the general psychology behind the persecution of political offenders in China. As a ruler of a dynasty that had lasted for a century and was likely to last for many more, he (and very occasionally she) saw no need for leniency toward those who challenged or questioned the highest authority. In other words, the "confidence level" of the ruling class was often so high that they did not think a "safety clause," warranted any consideration, i.e. treating political offenders courteously today so that if the regime was ever overthrown, the rulers themselves would receive reciprocal leniency.<sup>17</sup>

Although modern China is no longer ruled by a feudal emperor, China is undoubtedly still a totalitarian regime. The justification for the ruling party is no longer the "Son of Heaven" argument, but rather a more carefully crafted "people's representative" argument, i.e. the leading power is no longer a self-proclaimed godly figure, but rather a self-proclaimed class of protectors of the people's interest.<sup>18</sup> Despite this difference, the current regime is not that different from the past ones. It

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<sup>16</sup> HUCKER, *supra* note 15, at 55. "The Chinese world should be united under a single Son of Heaven, and his control should be effectively centralized." *Id.*

<sup>17</sup> KITTRIE, *supra* note 10.

<sup>18</sup> PIERRE M. PERROLLE, FUNDAMENTALS OF THE CHINESE COMMUNIST PARTY 6 (International Arts And Sciences Press 1976). "The great leader Chairman Mao has also pointed out that 'the Communist Party is a political party which works in the interest of the nation and people and which has absolutely no private ends to pursue.'" *Id.*

still holds all the major bargaining chips and has no formidable bargaining opponent. The regime owns every inch of land in China and what is on the real estate market are not land ownership rights, but only rights to lease land from the government.<sup>19</sup> The CCP has a monopoly in all aspects of politics and policy making. There is no realistic check on government power, as the legitimacy of the ruling party is not decided by an outside source or any independent means, but is rather self-evident simply because it is a “people’s party.” Challenging the party, therefore, automatically means, at least on its face, challenging the people. Unlike the political offenders in western Europe who, for a long period of time, had been viewed as noble offenders providing alternatives on how a society should be run, the offenders in China are pictured as sinister conspirators who target nothing but the people.<sup>20</sup> For example, in Mr. Liu’s guilty verdict, the court, though making no false factual allegation, used a limited, yet significantly colored term of art to portray the defendant as one who had a grudge against society. The court stated that Mr. Liu committed these crimes “due to his *dissatisfaction* with the political and socialist system of our country’s people’s democratic dictatorship.”<sup>21</sup> This language, especially in the special context of the Chinese language, shows that the court found nothing noble about this offender, who instead of feeling lucky and satisfied with the great people’s society as any reasonable person would do, chose to poison the health of the society. It is, therefore, reasonably foreseeable that these kinds of “undeserving” offenders are not

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<sup>19</sup> See Xiaogang Deng, Lening Zhang & Andrea Leverentz, *The Dual System of Land Use Policy and Its Related Problems in Contemporary China*, in CHINA IN AN ERA OF TRANSITION: UNDERSTANDING CONTEMPORARY STATE AND SOCIETY ACTORS 79-84 (Reza Hasmath & Jennifer Hsu eds., Palgrave Macmillan 2009).

<sup>20</sup> Theodore H.E. Chen, *The Chinese Communist Regime: A Brief Review*, in COMMUNIST CHINA 30 (Yung Wei ed., Charles E. Merrill Publishing Company 1972). “A campaign for the ‘suppression of counterrevolutionaries’ was launched in the latter part of 1950, and the ensuing months saw a crescendo of mass trials, mass executions, and wholesale persecution of all who were believed or suspected to be hostile to the new regime ... These campaigns against the ‘enemies of the people’ left no doubt among the people that the Communist would brook no interference with what they were setting out to do.” *Id.*

<sup>21</sup> The Verdict, *supra* note 3 (emphasis added).

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likely to get the leniency in China that their counterparts in Europe receive.

Portraying itself as the eternal representative of the people is the foundational tradition of the China's ruling party. The party's ruling philosophy and policy priorities are often reflected in the form of policy directives from the President, who is also the chairman of the party. In 2006, the current President, faced with a booming Chinese economy with the type of momentum challenging the top players in the international community, called "for the creation of a 'harmonious society.'"<sup>22</sup> A term this vague needs interpretation, a large part of which has been accomplished through the actual treatment of dissidents. This call for a more harmonious and stable society has turned out to be an effective "preemptive strike" against dissidents. Rather than creating a society in which people can harmoniously and freely express their views publicly, this directive in fact encourages silencing dissidents and, therefore, creates a debate-free realm. The directive also goes a step further by explaining why the dissidents are enemies and how they can create harm by destabilizing the society, even though the vast majority of the speculated harm is really debatable. Additionally, this directive also indicates that the government should not only focus on the dissenting mind, but also dissenting conduct. The government is no longer interested in interfering in citizens' private lives and digging out their dissenting thoughts or attitudes. It now focuses on capturing actions and labeling them as real threats to society. When faced with the half-a-century-old international criticism of its persecution of dissidents, it is now easier for the Chinese government to fire back with the simple argument that the defendants are not simply political dissidents who targeted the heads of the regime, but rather criminals whose actions could have caused real harm to society.

To its credit, China has moved away from wanton persecu-

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<sup>22</sup> See Maureen Fan, *China's Party Leadership Declares New Priority: "Harmonious Society"*, WASH. POST, Oct. 12, 2006, at A18, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/11/AR20061-01101610.html>.



tion of people merely based on their social status or family background, as was the practice before and during the Cultural Revolution.<sup>23</sup> When a booming economy not only strengthens, but also arguably legitimizes the rule of party leadership, persecuting random citizens merely for “leading a capitalistic lifestyle” is clearly out of date, unnecessary, and perceived harmful to the regime itself. China has also emerged as one of the key players on the international stage, and as a result, the regime has tried to keep up with various international standards at least at the *de jure* level. For example, it has signed, though not yet completely ratified, many international conventions regarding civil, human, and refugee rights.<sup>24</sup> The persecutions of political offenders in China, however, have never ceased even with the world’s acceptance of China. Although in recent decades, open trials against the “anti-revolution culprits” have been a very rare event, persecution of political offenders has instead evolved into closed trials with non-ideologically-related charges. The open involvement of the party in these persecutions has been reduced and replaced with the judiciary utilizing ambiguous and overly broad statutes.<sup>25</sup> During the ancient dynasties, open execution and even public torture of dissidents served as a deterrence and maintained the status quo. During modern times, the ruling party, for the purpose of efficiency and apparent civility as well as its lack of confidence in ideology monopoly, has only been interested in finding a convenient and civil way, not necessarily the most brutal way, to silence dissenting voices. The government now puts its trust in the judiciary, a branch that has a very limited degree of independence especially in political cases, in order to maintain status quo by having it utilize China’s questionable Constitution and

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<sup>23</sup> BAOGANG GUO AND SUJIAN GUO, CHINA IN SEARCH OF A HARMONIOUS SOCIETY: Challenges Facing Chinese Political Development 3 (Lexington Books 2008). “The emphasis on social harmony and stability represents a break away from the era of political campaign and class struggle and transition from a revolutionary party to a governing party.” *Id.*

<sup>24</sup> See Congressional-Executive Commission on China, *Core United Nations Documents Signed, Ratified, or Acceded to by China*, <http://cecc.gov/pages/virtualAcad/inthrol/index.php>.

<sup>25</sup> See Human Rights in China & Human Rights Watch/Asia, China: Whose Security? “State Security” in China’s New Criminal Code 2 (1997), available at <http://hrichina.org/public/PDFs/Reports/HRIC-Security.pdf>.

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the series of “National Security Laws.” The CCP expects the “harmonious society” directive to deliver satisfactory results in sensitive cases not for an ideological battle, but for maintaining the status quo. The result, as shown in Mr. Liu’s case, has lived up to the CCP’s expectations so far.

### III. THE MODERN TOOLS OF POLITICAL PERSECUTION

#### A. *The Chinese Constitution*

The mere fact that a regime has a Constitution does not automatically guarantee that the rights and privileges found in that document can be effectively protected in real life. In many totalitarian regimes, a document with the title “The Constitution” serves more of a propaganda function rather than dividing and limiting powers at a substantive level. This type of “Stalin Constitution” guarantees the permanent dominance of the drafters, oftentimes the regime itself, rather than guaranteeing a peaceful and orderly change of administration.<sup>26</sup> The true value of the Constitution should be seriously questioned when the constitutionality of the government’s policies is never formally questioned as well as when legislation, having language and effects that clearly contradict stated principles and provisions in the Constitution, is never struck down as unconstitutional.

The concept of the Constitution, recognized by liberal democratic countries as a power limiting “social contract,” has never been widely accepted under China’s regime. Also, the concept of “rule of law” in China differs from that in most constitutional democracies. As Jerome Cohen pointed out in one of his speeches, “the simplest and best [definition for the term ‘rule of law’] is ‘government under law.’”<sup>27</sup> However, the

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<sup>26</sup> WILLIAM C. KIRBY, *The Chinese Party-State Under Dictatorship and Democracy on the Mainland and on Taiwan*, in REALMS OF FREEDOM IN MODERN CHINA 113, 117 (William C. Kirby ed., 2004) (quoting Joseph Stalin, “if there is no constitution . . . enemies can charge that you have seized power by force. They could say that the government was imposed on the people . . . you should take this weapon away from your enemies.”). *Id.*

<sup>27</sup> UCTelevision, *Jerome Cohen: Is There Law in China? Is There Justice?*,

term “rule of law” in China often relates to the legalist view of how society should function with laws provided by the rulers.<sup>28</sup> The laws are designed to make citizens behave and act how the regime wants them to. Under this view of the “law,” the private individual has no legitimate civil rights and personal freedom must not in any way challenge the ruler’s reign. In this case, the ruler is the CCP. Under this view, all laws are essentially directives from above that maintain social order for the ruler. The entity that gives these directives, in the form of laws, is not bound by any form of “social contract” that would limit the laws and policies the regime could legally enact. The CCP, therefore, need neither comply with the “law” nor the Constitution.

The Chinese Constitution is a product of a regime that is unwilling to limit its powers and subject itself to checks and balances. The Preamble summarizes the “great victory” led by the CCP and Article 1 under the First Chapter describes that the Constitution is essentially a tool that unconditionally affirms and legitimizes the ruling party’s political power.<sup>29</sup> Article 1 states:

[t]he People’s Republic of China is a socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the People’s Republic of China. Disruption of the socialist system by any organization or individual is prohibited.<sup>30</sup>

This clause achieves two important goals. First, it covertly identifies the CCP as the sole leading political entity of the nation. Also, its position is not subject to challenge provided this

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YOUTUBE (Apr. 24, 2008), 22:34, <http://www.youtube.com/watch?v=G1JG4-jpY42o>.

<sup>28</sup> JAMES M. ZIMMERMAN, *CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES* 40 (American Bar Association 3d ed. 2010). “Overall, the Rule of Law (*fazhi*) in ancient China is characterized as a Rule of Man (*renzhi*); the law was designed for the benefit of those governing, rather than as an instrument of divine sanction or supreme authority. To the legalist, the ruler was above the law.” *Id.*

<sup>29</sup> XIAN FA [CONSTITUTION] Preamble (1982) (China), *available at* [http://english.gov.cn/2005-08/05/content\\_20813.htm](http://english.gov.cn/2005-08/05/content_20813.htm).

<sup>30</sup> XIAN FA [CONSTITUTION] art. 1 (1982) (China), *available at* [http://english.gov.cn/2005-08/05/content\\_20813.htm](http://english.gov.cn/2005-08/05/content_20813.htm).

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version of the Constitution is valid. Since the CCP is the only political party in China that claims to be the sole representative of the working class, and no other political party, either legally or illegally formed, has the ability or the legitimacy to challenge its position, the CCP can simply point to Article 1 of the Constitution, which was drafted under the supervision of the CCP, and prove its own legitimacy. It is, of course, a circular argument for a self-proclaimed power. However, even pointing out the fallacy of this circular argument can potentially be a violation of the Constitution because the second function of this article effectively prohibits such doubt, which can arguably constitute “disruption of the socialist system.” This second function limits the remaining constitutional provisions as well as all laws and regulations.

The conceptual vagueness of “disruption of the socialist system” makes it impossible to challenge any decision made by the CCP. What constitutes “disruption of the socialist system” is difficult to determine. First, there is the issue of what qualifies as a “disruption” under the Constitution. For example, does a “disruption” include a law or activity that has realistic likelihood of interfering with the system or would it encompass any form of disagreement with the system, however ineffective the disruption is in toppling the system? Second, what really constitutes a “socialist system” is a myth. It should not come as a surprise that party leaders, scholars, and common citizens might have very different interpretations of “socialism” and may disagree as to whether the country is still on the “socialist path.” However, the final say lies exclusively in the hands of the CCP. It virtually puts itself above the People’s Congress, the legislative body that is supposed to make no law that ever “disrupts the socialist system.”

The first article of the Chinese Constitution renders all of the other rights below it *de jure* limited rights. In contrast, constitutional rights in other countries appear unqualified throughout their constitutions. Even the unqualified rights in other constitutions are still subject to some kind of “balancing test” from time to time. However, the more obvious the restrictive language and the more powerful the underlying restric-

tion, the less basic the rights become. The very fact that some constitutions choose to leave their basic rights unqualified, at least textually, is probably due to the fear that any written and settled restriction within the constitutions might render these rights less fundamental. However, the basic line of logic of the Chinese Constitution, as reflected by the Preamble and Article 1, is that all rights are at least subject to the scrutiny of the survival of the “socialist system.” Once there is a conflict, the socialist system must triumph. It is also important to note that this Constitution probably never contemplates any conflict regarding this issue among the Government, People’s Congress, and the Court. The language is in fact directed against individual citizens and other organizations.<sup>31</sup> Due to the CCP’s position at the top of the hierarchy of power, the political branches in China have maintained almost perfect harmony when it comes to politically sensitive cases. The People’s Congress has never passed legislation that has later been found “anti-socialist.” The Court never engages in any analysis of the constitutionality of enacted laws and has instead always faithfully applied them, especially in politically sensitive cases. Even where it should constitute judicial misconduct to reduce the legal analysis regarding freedom of speech issues to something as brief as “[the] actions have *obviously* exceeded the freedom of speech category,”<sup>32</sup> the Court has always refrained from providing meaningful guidelines in many constitutional cases. This reluctance in meaningful adjudication in political cases makes the Court’s decisions unclear to the readers.

The following case from Singapore involving the constitutional guarantee of freedom of speech, serves as an example of how some explicitly restrictive language in a constitution can reduce an arguably basic right to one that is at the mercy of lawmakers.

Article 14 of the Constitution of the Republic of Singapore guarantees its citizens freedom of speech. Section 1(a) of Article 14 provides that “every citizen of Singapore has the right

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<sup>31</sup> *See id.* (“Disruption of the socialist system by any *organization* or *individual* is prohibited.”) (emphasis added).

<sup>32</sup> The Verdict, *supra* note 3 (emphasis added).

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to freedom of speech and expression.”<sup>33</sup> This freedom, however, is explicitly limited by Section 2 of Article 14, which states that:

Parliament may by law impose . . . on the rights conferred by clause (1)(a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence.<sup>34</sup>

This constitutional provision is very different from one in which the freedom of speech provision is unqualified, for example, as in the US Constitution. Likewise, in the Chinese Constitution, there is no textual limitation immediately relating to the clause regarding freedom of speech.<sup>35</sup> However, Article 1's "disruption of socialist system" language explicitly limits all rights. Therefore, when it comes to restricting some rights in the Constitution, China's "covert" restriction in fact functions very similarly to Singapore's "overt" restrictions.

In *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*, a foundational freedom of expression case, the Court of Appeal of Singapore explains the relationship between a right in the Constitution and the possibility of it being limited or even repealed.<sup>36</sup> *Jeyaretnam* involves the suicide of Teh, an official of the People's Action Party. The People's Action Party was the party in power at the time of the litigation. Shortly before his suicide, Teh was publicly under investigation for corruption charges. Following the news of Teh's suicide, Jeyaretnam, leader of the Worker's Party and appellant in this case, made a

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<sup>33</sup> CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 14, § 1(a) available at [http://statutes.agc.gov.sg/non\\_version/cgi-bin/cgi\\_retrieve.pl?&actno=Revised-CONST&date=latest&method=part](http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?&actno=Revised-CONST&date=latest&method=part).

<sup>34</sup> *Id.* art. 14, § 2(a).

<sup>35</sup> See XIAN FA art. 35 (1982) (China), available at [http://english.gov.cn/2005-08/05/content\\_20813.htm](http://english.gov.cn/2005-08/05/content_20813.htm) "Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration." *Id.* art. 1.

<sup>36</sup> See *Benjamin v. Yew*, [1992] 2 SLR 310 (Court of Appeal) available at <http://www.singaporelaw.sg/rss/judg/9713.html>.

public speech in front of his political supporters. Jeyaretnam questioned why the government had not conducted an inquiry into how Mr. Teh obtained the unusual poison he had used to commit suicide. Furthermore, Jeyaretnam wanted to know how the Prime Minister, the respondent in this case, had responded to Teh's letter to him one day prior to the suicide in which Teh had written "I will do as you advise."<sup>37</sup> The respondent sued for defamation alleging that the appellant's speeches "were understood to mean that the plaintiff was guilty of dishonourable and/or criminal conduct."<sup>38</sup> In his appeal, the appellant cited "constitutional provisions guaranteeing freedom of speech in other jurisdictions, such as Canada, India and the United States," and relied heavily on the decision of *New York Times v. Sullivan*.<sup>39</sup> He argued that:

the speech made ... was a publication concerning the official conduct of the respondent as Prime Minister or the performance of his duties as such; that the appellant had a legitimate interest in the subject matter of his speech, and that the publication was made to those having a corresponding and legitimate interest, and hence the occasion in which the publication was made was privileged.<sup>40</sup>

After reviewing *New York Times v. Sullivan* and the other foreign cases cited by the appellant, the court held that it was "unable to follow" those decisions.<sup>41</sup> The court reviewed the First Amendment of the US Constitution and found that "[n]o such express prohibition [which prohibits Congress from making any laws 'abridging the freedom of speech, or of the press' exists] in art 14 of our [the Singapore] Constitution."<sup>42</sup> The court found that Section 2 of Article 14 of the Singapore Constitution explicitly placed two categories of restrictions upon freedom of speech:

first, such restrictions as it considers *necessary and expedient* in

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<sup>37</sup> *Id.* para. 11.

<sup>38</sup> *Id.* para. 13.

<sup>39</sup> *Id.* para. 43.

<sup>40</sup> *Id.* para. 44.

<sup>41</sup> *Id.* para. 56.

<sup>42</sup> Benjamin v. Yew, [1992] 2 SLR 310, para. 56 (Court of Appeal), available at <http://www.singaporelaw.sg/rss/judg/9713.html>.

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the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality; and second, *restrictions designed* to protect the privileges of Parliament or *to provide against* contempt of court, *defamation* or incitement to any offence.<sup>43</sup>

The court held that, in the context of defamation, freedom of speech is completely at the mercy of the Parliament:

[w]hile the first category of restrictions must satisfy the test of necessity and expediency in the interest of the various matters specified therein, the second category of restrictions is not required to satisfy any such test. Thus, Parliament is empowered to make laws to impose on the right of free speech restriction designed to provide against defamation.<sup>44</sup>

The court further pointed out that the limitation provision in Section 2 of Article 14 is broad.<sup>45</sup> Comparing Article 14 with Article 10 of the European Convention on Human Rights, the court noted that the Singapore limitation provision does not include the requirement “*necessary* in a democratic society” as is found in Article 10.<sup>46</sup>

In this case, the Singapore court essentially approved a quick two-part analysis. First, it must be determined whether the Constitution allows Parliament to enact the statute that convicted the defendant, and if so, then it must be determined whether the defendant is guilty under this statute. As for the issue of whether the right to freedom of speech can be repealed by Parliament, it requires no discussion in the Singapore court because the answer is obvious: the Constitution explicitly answers this question in the affirmative. Freedom of speech in Singapore is not a right that requires extensive tests and scrutiny of those laws that restrict it. This Constitution renders such a right no more different than the legal freeway speed limit, both can be easily regulated by legislation. In this sense, the Singapore court did exactly what the Constitution requires it to do by upholding Parliament’s law and refusing to weigh it

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*



against any “constitutional right.”

Likewise, when the Chinese court charges a defendant for violating a statute that supposedly has the purpose of protecting the socialist ideology, the government, or both, the court will most likely deem it irrelevant to consider whether such a statute is unconstitutional because the Constitution has a clear position on socialism. It is logical for the court to uphold a statute that promotes and preserves the CCP's interest, i.e. the socialist system because that is what the Constitution mandates. In this aspect, the Chinese court, like the Singapore court, is indeed closely following the Constitution.

### *B. The Court's Lack of Independence*

Not all express limitations on constitutional rights in the constitutions render them easy and effective tools to silence dissent. It greatly depends on what the limitation is and who is deciding the issue. The latter involves the issue of judicial independence. A limitation clause can be broadly drafted in the Constitution yet, if the judiciary has the power to independently hold that there is no nexus between the defendant's action and the limitation clause, many forms of political dissent may be permissible.

For example, Germany's Basic Law has an express limitation clause regarding freedom of expression. It states that “[t]hese rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.”<sup>47</sup> What constitutes “personal honor” is vague and largely undefined. A good faith criticism of a person's conduct could arguably be viewed as an attack on personal honor if the criticism was somehow humiliating. This limitation clause has the potential of creating an enormous chilling effect on expressions that convey any negativity about an individual. The German Federal Constitutional Court, however, did not allow this broad language in its Basic Law to turn into a catch-all restriction. It has held that “[t]he basic

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<sup>47</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. V(2) (Ger.), available at <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

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right to freedom of expression, the most immediate aspect of the human personality in society, is one of the most precious rights of man,”<sup>48</sup> and thus

general laws which have the effect of limiting a basic right must be read in the light of its significance and always be construed so as to preserve the special value of this right, with, in a free democracy, a presumption in favour of freedom of speech in all areas, and especially in public life.<sup>49</sup>

Had the German court been controlled or heavily influenced by a government that sees political disagreement as a form of “dishonor” or “disruption,” the holding, which put a high value on the right to freedom of expression concerning public matters, most likely would have been different.

Ideally, a higher degree of independence of the Chinese courts may still be able to cure the restrictive attitude toward dissent created by Article 1 of the Constitution. Arguably, even if the socialist system must be protected, many actions may not rise to the level of “disruption.” In Mr. Liu’s case, for example, although he wrote many articles critical of the government, all of his articles are banned from publication within China, censored on the Internet and, therefore, their circulation within China were limited to only a small group of dissidents.<sup>50</sup> In his statement of defense, Mr. Liu argued that “[his] articles do not contain any language inciting violence, nor can they realistically incite violence because [he] published those articles on foreign websites that cannot be accessed from China without using any bypassing technology.”<sup>51</sup> Mr. Liu also pointed out that “his articles and ‘Charter 08’ contain no content of ‘defamation

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<sup>48</sup> Bundesverfassungsgericht BVERFGE [Federal Constitutional Court] Jan. 15, 1958, 7 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 198 (Ger.), *translated in Foreign Law Translations*, INST. FOR TRANSNATIONAL LAW, [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=1477](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=1477).

<sup>49</sup> *Id.*

<sup>50</sup> Liu Xiaobo An Yishen Bianhu Ci, (刘晓波案一审辩护词) [*Statement of the Defendant in the First Trial of Liu Xiaobo*], DEUTSCHE WELLE (Jan. 4, 2010) [hereinafter *Statement of the Defendant*] <http://www.dw-world.de/dw/article/0,,5075054,00.html>.

<sup>51</sup> *Id.*

or libel,' . . . because they reflect Mr. Liu's own personal political opinions, which are his personal 'value judgment,' rather than 'statements of facts.'"<sup>52</sup> The court, however, not only ignored and refused to address these legitimate defenses, but also set up unreasonable procedural obstacles for the defendant. During the oral argument, instead of allotting an equal amount of time for each side, the Chief Judge stated that the defendant's time should not exceed the prosecutor's time, however long the latter might be.<sup>53</sup> As was pointed out by the defense attorney, this arbitrary rule created the bizarre possibility that "the defendant might only have a few seconds for his oral argument if the prosecutor simply stated 'we respectfully request this Court to give harsh punishment to the defendant,' a statement of which would only last no more than a few seconds."<sup>54</sup> During the defendant's statement in oral argument, the Chief Judge also interrupted Mr. Liu as he mentioned that "his life journey made a turn in June 1989."<sup>55</sup> The Chief Judge stated, "please do not elaborate on the '6.4 Incident.'"<sup>56</sup> Public discussion of the "6.4 Incident," or what is more commonly known as the "Tiananmen Massacre," is taboo in China. However, the court's quick self-censorship over this issue during a closed trial while the defendant was merely mentioning a date rather than expanding on any of the substantive events that occurred during that incident, indicates the court's low degree of independence from the CCP's political influence.

The Chinese court's lack of independence from political influence is a result of the Chinese Constitution's design. As Stephanie Balme has pointed out, on the issue of judicial independence, "the . . . Constitution is essentially contradictory. On the one hand, it declares and ensures the supremacy of the ruling party. On the other hand, it proclaims that 'judicial power should be exercised independently.'"<sup>57</sup> This latter clause makes

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Statement of the Defendant, *supra* note 50.

<sup>57</sup> Stéphanie Balme, *Local Courts in Western China: The Quest for Independence and Dignity*, in *JUDICIAL INDEPENDENCE IN CHINA* 154, 161 (Randall Peerenboom ed., 2010).

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it seem that the Constitution does promote judicial independence. However, putting it in the context of the CCP's power monopoly, and the fact that, as was also pointed out by Ms. Balme, Article 128 of the Constitution states "[l]ocal people's courts at different levels are responsible to the organs of state power which created them,"<sup>58</sup> as well as the important fact that "the vast majority of [the Chinese judges] are party members,"<sup>59</sup> it is reasonable to argue that this requirement for "independently exercising judicial power," merely requires the appearance of independence, especially in politically sensitive cases. Decisions are sufficiently "independent" as long as the verdicts come from the court and are signed by the judges. This is regardless of the fact that the judges may have had confidential communications with party leaders or the fact that many judges, as party members themselves, have been actively self-censoring their rulings, as was shown in Mr. Liu's case.

The Constitution's text does not explicitly prohibit the CCP from influencing the court. In Article 5, the Constitution lists "all political parties" in parallel with "all state organs, the armed forces, ... public organizations, and all enterprises and institutions" when it comes to abiding the Constitution.<sup>60</sup> In Article 126, the clause that establishes judicial independence, the Constitution only states that the judiciary is not subject to interference by "any administrative organ, public organization or individual,"<sup>61</sup> leaving out "political parties." The reality is consistent with this textual design: the court not only aligns itself with the party in politically sensitive cases, but is also very explicit and often outspoken about the judiciary's *duty* to follow the party. Several past and current Chief Justices of the Supreme People's Court have announced or written articles pledging allegiance to the CCP. The current Chief Justice, Wang Shengjun, in his recent article published in *Qiushi*, a journal of

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<sup>58</sup> XIAN FA [CONSTITUTION] art. 128 (1982) (China), *available at* [http://english.gov.cn/2005-08/05/content\\_20813.htm](http://english.gov.cn/2005-08/05/content_20813.htm).

<sup>59</sup> *Id.* at 164.

<sup>60</sup> XIAN FA art. 5 (1982) (China), *available at* [http://english.gov.cn/2005-08/05/content\\_20813.htm](http://english.gov.cn/2005-08/05/content_20813.htm).

<sup>61</sup> *Id.* art. 126.

the Central Committee of the CCP, argued that whether the judiciary can play a larger role in maintaining social order directly affects the “[Communist] Party’s ruling position.”<sup>62</sup> He concluded his article with an unequivocal statement about the judiciary’s position *under* the CCP,

[t]he People’s Court must firmly support the Party’s leadership, and push forward its work ... , with the Party and the country’s overall interest at the center; it must timely report its work to the Party, and closely use the leadership of the Party to face difficulties and problems in its work.<sup>63</sup>

### *C. The “National Security Laws”*

In China, the days have passed when political offenders were forcibly marched to the streets and publicly denounced and ridiculed, as these “struggle sessions” do not fit China’s new international image. Political offenders are also no longer confronted with the minute details as to how their political views go against communist or socialist doctrines and why they should, therefore, wholeheartedly embrace the chance of reeducation. Economic growth is becoming the main, if not the only priority. Social stability and continuing the monopoly of power are major directives of the CCP.<sup>64</sup> For these reasons, quick and quiet disposal of political dissidents, rather than belabored open ideological battles with them, is preferred by the ruling party. In 1997, the year when the United Kingdom returned Hong Kong to China, “counterrevolution crimes” started to disappear from the Criminal Code and were replaced with a series of laws criminalizing acts that threaten national security.<sup>65</sup>

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<sup>62</sup> Shengjun Wang, *Push Forward the Three Key Tasks to Achieve New Development in the Work of the People’s Court*, [http://www.qstheory.cn/zxdk/2010/201014/201007/t20100713\\_39319.htm](http://www.qstheory.cn/zxdk/2010/201014/201007/t20100713_39319.htm).

<sup>63</sup> *Id.*

<sup>64</sup> GUO & GUO, *supra* note 23, at 3. “The emphasis on social harmony and stability represents a break away from the era of political campaign and class struggle and transition from a revolutionary party to a governing party. In this sense, the party is increasingly interested in enhancing its governing capacity and in search of new sources of political legitimacy.” *Id.*

<sup>65</sup> See Human Rights in China & Human Rights Watch/Asia, China: Whose Security? “State Security” in China’s New Criminal Code 2 (1997), available at <http://hrichina.org/public/PDFs/Reports/HRIC-Security.pdf>.

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This is a further step toward “depoliticizing” political persecutions.

Mr. Liu was convicted under Article 105 Section 2 of the Chinese Criminal Code.<sup>66</sup> This statute criminalizes spreading rumors, slander, or other acts that incite to subvert the power of the state or overthrow the socialist system.<sup>67</sup> The new law's language is so broad that it can effectively cover offenses both with and without specific anti-regime intent. In many cases, a petition or an appeal for reform, however peaceful the method or sincere the language is, can be held as a form of “subversion”. Mr. Liu's case is one such example.

There have been several recent cases similar in nature where the defendants, many of them human rights activists, have been convicted merely for their writings criticizing the Chinese Government. In 2008, Hu Jia was convicted under “inciting subversion of state power and the socialist system” for his open letters and articles criticizing the Government's human rights record before the Beijing Olympics.<sup>68</sup> In February 2010, Tan Zuoren, an activist seeking to document shoddy constructions that contributed to deaths during the 2008 earthquake, was convicted for inciting subversion in his emailed comments about the 1989 Tiananmen Massacre.<sup>69</sup> In July 2010, Gheyret Niyaz, a Uyghur journalist, was convicted of endangering state security as a result of his speaking to foreign journalists.<sup>70</sup> This list could go on and Liu Xianbin, who was recently arrested for inciting subversion,<sup>71</sup> is likely to be added

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<sup>66</sup> See The Verdict, *supra* note 3.

<sup>67</sup> Xingfa (刑法) [Criminal Code] (promulgated by Order No. 83 of the President of the People's Republic of China, Mar. 14, 1997, effective Oct. 1, 1997) art. 105 (China), available at [http://www.npc.gov.cn/english-npc/Law/2007-12/13/content\\_1384075.htm](http://www.npc.gov.cn/english-npc/Law/2007-12/13/content_1384075.htm).

<sup>68</sup> *Profile: Chinese Dissent Hu Jia*, BBC NEWS, (Dec. 17, 2008), <http://news.bbc.co.uk/2/hi/asia-pacific/7662238.stm>.

<sup>69</sup> Lucy Hornby, *China quake activist jailed for inciting subversion*, REUTERS (Feb. 9, 2010), available at <http://www.reuters.com/article/-idUSTRE6180QA20100209>.

<sup>70</sup> Emma Graham-Harrison, *China jails Uighur journalist for 15 Years: Employer*, REUTERS, July 23, 2010, available at <http://www.reuters.com/article/idUSTRE66M1PF20100723>.

<sup>71</sup> See Press Release, Human Rights in China, Case Update: Dissident

to this list.

While the old “counterrevolution crimes” aimed at maintaining an ideological monopoly, the new “Endangering National Security” laws aim at maintaining the current status quo and the party’s power monopoly regardless of whether the current leadership is still faithful to “socialism” and “the communist revolution.” With this new “subversion of state power” language added into the Criminal Code, any challenge against the leading authority, whether it be anti-socialist or pro-socialist in nature, can easily be dismissed as a violation of law. A true believer in communism can easily be found guilty under this law as long as he publicly questions the party’s policies including the market economy and the extension of party membership eligibility to the business class. Interestingly and to some degree expectedly, in Mr. Liu’s case, the Court showed no interest in addressing his argument where he compared his writings with the political statements made by past high-ranking CCP leaders. When put into historical and contemporary contexts, these statements look as incriminating, if not more so, for the purpose of subversion.<sup>72</sup> It is fair to say that the statute is practically so effective in convicting dissidents that being charged under this statute is almost in itself evidence sufficient in proving that the purpose of the statute has been triggered, i.e. the “state power” (the regime) is feeling threatened enough to press charges. This is so for two reasons. First, the Court has never failed to convict a defendant facing charges under the “National Security Laws,” especially the “Inciting Subversion of State Power” statute. Second, the Court almost always avoids adequate consideration of either the evidence or the defendant’s arguments. Needless to say, had the Court maintained some degree of independence from political influence, a

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Liu Xianbin Arrested on Suspicion of Inciting Subversion of State Power (July 6, 2010), *available at* [http://www.hrichina.org/public/contents/press?revision\\_id=175028&item\\_id=175026](http://www.hrichina.org/public/contents/press?revision_id=175028&item_id=175026).

<sup>72</sup> See *Statement of the Defendant*, *supra* note 50 (“Each province in China should break away from the central government; they should divide into 27 nations, such as ‘the Republic of Anhui,’ ‘the Republic of Guangdong,’ and ‘the Republic of Taiwan.’” (quoting Letter from Mao Zedong on Arguments Against Unification (Oct. 10, 1920); Mao Zedong, *The Republic of Hunan—the Essential Problem in Hunan’s Development*, TA KUNG PAO, Sept. 3, 1920)).

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conviction under this vague and potentially unconstitutional statute could be quite difficult. Unfortunately, with the Court faithfully siding with the prosecutors in these cases, the reality has proven to be the exact opposite.

### IV. THE DOUBLE-EDGED SWORD STRIKES BACK

Through the Constitution's design, the control over the judiciary, and the newly crafted "National Security Laws," the CCP appears to possess an arsenal of legal tools to effectively suppress political dissent and maintain stability. This hard-line approach to stability, however, is bound to put tremendous pressure on every level of government as well as the grieving, mistreated citizens, who are sharply increasing in number as a result of economic growth and the enlarging gap between rich and poor.

A hard-line approach to dealing with political dissidents and public grievances as well as media censorship over the reporting of these events, often leads to a disguised sense of stability, while unresolved conflicts are merely temporarily suppressed. A peaceful career dissident like Mr. Liu, who lived in a labor camp, endured police surveillance ever since 1989, and now faces another eleven-year prison term, is a rarity in China as well as in any society.<sup>73</sup> The vast majority of the grievances against the Chinese Government today are each personal and issue-specific rather than a general call for political and legal reform. Many of these issues have nothing to do with an ideology nor challenge CCP leadership. Yet, the strong emphasis on stability and maintaining a "harmonious society" requires the government, often the local governments, to perceive a widespread grievance as a national security risk and suppress it at any cost. Without any solid guidelines as to which rights are guaranteed by the Constitution other than the superseding directive to create a harmonious society by, for example, always preventing public assembly, governments at different levels firmly hold a very inflexible attitude toward even the most

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<sup>73</sup> Pen American Center, China: Liu Xiaobo, <http://www.pen.org/view-media.php/prmMID/3029/prmID/172> (last visited Nov. 29, 2010).



peaceful form of public dissent. Such an inflexible approach has created bizarre consequences, such as the “protest zones” set up during the Beijing Olympics, for which all seventy-seven applications for lawful protest within the zones were denied.<sup>74</sup> The applicants, including a seventy-nine-year-old woman, were arrested and sentenced to reeducation labor camps for submitting these “applications in accordance with the government’s own instructions.”<sup>75</sup> Protesting without a license is considered illegal in China. After this “protest zone” incident, it is clear that even following the proper, yet still arguably unconstitutional, procedure of filing an application for protest is no different than turning oneself in for a crime. Under these circumstances, public grievances can easily turn violent.

In recent years “[t]he number of mass protests has risen rapidly, from 58,000 in 2003 to more than 74,000 in 2004 . . . . According to the state media, over 1,800 police were injured and 23 killed during protests in just the first nine months of 2005.”<sup>76</sup> This number, of course, does not include the mass protest in Tibet in 2008 and the violent unrest in Xinjiang, China in 2009, which has been the deadliest protest since 1989. The widespread tension created as a result of land disputes and forced evictions has been a recurring episode in recent years. In July 2010, ten thousand residents in Suzhou “clashed with riot police” over a land dispute.<sup>77</sup> As much as the censorship machine tries its best to prevent news of this kind from spreading, it is undeniable that the goal of creating a “harmonious society” has not been a successful one, especially when the term “harmonious society” has often become the source of satire in private life and cyberspace.<sup>78</sup>

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<sup>74</sup> See Andrew Jacobs, *Too Old and Frail to Re-Educate? Not In China*, N.Y. TIMES, Aug. 20, 2008, at A1, available at <http://www.ny-times.com/2008/08/21/sports/olympics/21protest.html>.

<sup>75</sup> RICHARD KOMAIKO & BEIBEI QUE, *LAWYERS IN MODERN CHINA* 1 (2009).

<sup>76</sup> Fu Yunlin & Randall Peerenboom, *A New Analytical Framework for Understanding and Promoting Judicial Independence in China*, in *JUDICIAL INDEPENDENCE IN CHINA* 95, 109 (2010).

<sup>77</sup> *Thousands in Five-Day China Demo: Report*, SYDNEY MORNING HERALD (July 20, 2010), <http://news.smh.com.au/breaking-news-world/thousands-in-five-day-china-demo-report-20100720-10i3b.html>.

<sup>78</sup> See Evan Osnos, *Decoding Chinese Humor*, NEW YORKER BLOG (June 17, 2009), <http://www.newyorker.com/online/blogs/evanosnos/2009/06/de>

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A most troubling signal is that the legal system, especially the judiciary, has played little part in reducing social unrest. While helping the Government put away dissidents for drafting articles or petitions as well as leaders of public protests for “disruption social order,” the courts have failed to offer an available remedy for grieving citizens, who feel wronged by the Government or a private party having significant ties to the Government. In his article, Randall Peerenboom argued for the justification of limiting court access in some cases because “the courts lacked the resources, competence, and stature to provide effective relief ... [and] forcing the courts to handle such cases had undermined the authority of the judiciary and contributed to a sharp rise in petitions and mass protests.”<sup>79</sup> Yet, this argument may have overlooked the causal link between many of the mass protests and the court’s role. It is often not the case that the court lacks judicial competence, such as a relevant statute, to adjudicate many of the disputes. Instead, in many cases, protests broke out after the court arbitrarily ruled in a certain way because of influence by the ruling party or individual officials. In other cases, plaintiffs, who resorted to violent protests, did not even use the judicial system knowing such an attempt would have been futile. Making the courts an available, effective, and unbiased source for a remedy does not mean that all disputes will be heard by them because of limited resources. However, when a remedy is not available from the judiciary or is virtually unattainable due to bias or corruption, any settlement out of court is easily subject to manipulation and corruption. The aggrieved party in these settlements is more, rather than less, likely to resort to protest or violence. For example, despite the fact that new laws and regulations have been enacted due to rampant violence and, in some cases, public suicides in forced evictions, the local court in Wuxi, China announced the policy, off the record to all the litigants, that it would dismiss any case relating to disputes of

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[coding-chinese-humor.html](#).

<sup>79</sup> Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, in JUDICIAL INDEPENDENCE IN CHINA 69, 79 (2010).

this nature. Disputes will not simply disappear when the court refuses to hear them. They will, however, become the spark that ignites the fire of social unrest.

## V. CONCLUSION

If there is any long-lasting truth throughout human history, it is that people disagree with one another and this is not likely to end any time soon. It is fair to say that there has never been a period in history, in any part of the world, where absolute “harmony” or “stability” has been achieved. Political dissent, or any dissent in general, is here to stay.

China’s Constitution and the judiciary have traditionally been the faithful guardians of the political status quo. After its emergence on the international stage, China has modernized its tools of political persecution. These tools have proven effective in every individual case. The Constitution has continued on its path of serving the CCP, the judiciary has continued on its path of faithfully maintaining the status quo, the amended Criminal Code has abandoned its obsession with ideology and become a pragmatic guardian of “state power.” This swift hard-line approach to any sign that disrupts “harmony” is effective in crushing political dissidents, but it is also effective in creating new dissidents by putting non-politically motivated people into the general category of people who challenge “state power.” This hard line approach puts all levels of government on constant alert and puts the judiciary in an indecisive position where it has to constantly look to the CCP for direction. Decades ago, the CCP’s confidence level depended on its ideological propaganda, and its open stance against the political offenders. Today, this level has dropped to covert trials and an increasing degree of censorship, not for the sake of a powerful ideology any more, but mainly for silencing the voices that may shake its only means of survival - economic growth, which has greatly benefited its interest groups.

If there is another long-lasting truth throughout human history, it is probably that there is no such thing as a perpetually growing economic index. When a society’s means for releasing social tension, such as an independent judiciary and the right to free speech and protest, are taken away, the socie-

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ty's "stability" becomes a zero-sum game. Without any means for peaceful and constructive political dissent, violent social strife is a likely result. Social tensions have erupted in tens of thousands of violent clashes each year as well as the five recent incidents of school children stabbing cases.<sup>80</sup> To prevent the current regime from following the fate of the old dynasties, perhaps some form of "noise" must be tolerated in this "harmonious society."

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<sup>80</sup> See Edward Wong, *Fifth Deadly Attack on a School Haunts China*, N.Y. TIMES, May 12, 2010, at A1, available at <http://www.ny-times.com/2010/05/13/world/asia/13china.html?scp=1&sq=china%20school%20children%20kindergarten&st=cse>.